

Glenn E. Westreich (State Bar No. 100457)
Rosalyn P. Mitchell (State Bar No. 173829)
NIXON PEABODY LLP
One Embarcadero Center, 18th Floor
San Francisco, CA 94111
Telephone: (415) 984-8200
Facsimile: (415) 984-8300

Attorneys for Plaintiff,
BISCOTTI, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BISCOTTI, INC.,

Plaintiff,

v.

KANDY KISS OF CALIFORNIA, INC.
d/b/a Zoey, and DOES 1-10, inclusive,

Defendants.

Case No. 07-00811

COMPLAINT FOR COPYRIGHT
INFRINGEMENT

JURY TRIAL DEMANDED

DISCLOSURE OF NON-PARTY
INTERESTED ENTITIES OR
PERSONS/CORPORATE DISCLOSURE

BZ

Plaintiff Biscotti, Inc., ("Plaintiff" or "Biscotti") by its attorneys Nixon Peabody LLP, for its Complaint against Defendant Kandy Kiss of California, Inc. d/b/a Zoey ("Defendant" or "Zoey") and Does 1-10, inclusive, alleges as follows:

1. This is an action for copyright infringement in violation of 17 U.S.C. § 501, et seq.

PARTIES

2. Plaintiff is a corporation formed under the laws of the State of California, with its principal place of business at 5601 San Leandro Street, Oakland, California, 94621.

3. Plaintiff is informed and believes, and on that basis alleges, that Defendant is a domestic business corporation organized under the laws of the California, with its principal place of business at 13931 Balboa Boulevard, Sylmar, California 91342.

4. Plaintiff is ignorant of the true names and capacities of defendants sued as Does 1-10 inclusive, and therefore sues these defendants by such fictitious names. Plaintiff is informed and

believes, and on that basis alleges, that the Doe defendants are, in some manner, entities related to Defendant and are responsible to Plaintiff for the matters alleged herein and/or are interested in the matters which are the subject of this Complaint, and, therefore should be made parties to this action. When the true names or capacities of Does 1-10 are ascertained, Plaintiff will amend this Complaint accordingly.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction under: (i) 28 U.S.C. § 1331 because the case concerns a question arising under the laws of the United States of America; (ii) 28 U.S.C. § 1338 because this is an action for copyright infringement..

6. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim occurred in this judicial district.

FACTUAL BACKGROUND

7. Plaintiff has been manufacturing and designing children's clothing for over twenty years. Plaintiff offers numerous dress collections for girls and infants.

8. Plaintiff's clothing is sold throughout the country in major department stores such as Nordstrom and J.C. Penney, and at over 800 boutiques and specialty stores. Plaintiff promotes its products through advertisements in trade and retail publications, attendance of tradeshow, and its web-site. Plaintiff's clothing is the subject of numerous news articles focusing on Plaintiff's innovative designs. Plaintiff has received numerous prestigious "Earnie" awards for design excellence. The Earnie Awards are voted on by a cross-section of industry experts, including fashion editors from both trade and consumer publications, representatives from children's buying offices and an array of national and specialty retailers. The top three nominees in each category are listed on a final voting ballot, which is distributed to a diverse selection of "Earnshaw's" retail subscribers across the country.

9. Plaintiff is the owner of United States Copyright Number VA 1-272-148, entitled "Emma's Rose." Emma's Rose is an original embroidery design of roses, leaves, and rose buds of various sizes, and includes a scalloped border. Emma's Rose was created in 2004. True and accurate

1 photographs of the Emma's Rose embroidery design are attached hereto as Exhibits A and B. A true
2 and correct copy of Copyright Number VA 1-272-148 is attached hereto as Exhibit C.

3 10. Plaintiff first incorporated the Emma's Rose design into various Biscotti dress
4 collections in August 2004, and shipped these Biscotti dress collections for sale to the public on or
5 about January 31, 2005.

6 11. Since their launch in 2005, the Biscotti dress collections containing the Emma's Rose
7 embroidery have become a mainstay of Plaintiff's designs. Plaintiff has sold tens of thousands of
8 Biscotti dresses containing the Emma's Rose embroidery to its customers.

9 12. Plaintiff is informed and believes, and on that basis alleges, that Zoey is a competitor
10 of Plaintiff in that Defendant, like Plaintiff, sells little girls' dresses to national and boutique retailers
11 and such garments are marketed and promoted to the same class of retail customers.

12 13. In [Spring 2006], Plaintiff first learned that Zoey was selling girls' dresses that
13 included embroidery substantially similar to the Emma's Rose design. In addition, the embroidery on
14 the Zoey's dresses is similar shades of pink, white and green to that of the Emma's Rose embroidery
15 on the Biscotti dresses.

16 14. Plaintiff is informed and believes, and on that basis alleges, that the Defendant has
17 shipped thousands of the infringing Zoey dresses to retail stores, such as Mervyn's and others, for
18 sale. Plaintiff is informed and believes, and on that basis alleges, that Zoey had access to Biscotti
19 dresses bearing the Emma's Rose embroidery prior to the launch of the infringing Zoey dresses
20 bearing designs substantially similar to the Emma's Rose.

21 15. Plaintiff is informed and believes, and on that basis alleges, that Defendant
22 intentionally and in bad faith copied Plaintiff's copyrighted Emma's Rose embroidery.

23 **CAUSE OF ACTION—COPYRIGHT INFRINGEMENT FOR EMMA'S ROSE**

24 16. Plaintiff repeats and realleges paragraphs 1-15 as if set forth fully herein.

25 17. The Biscotti dresses include original designs owned by Plaintiff, including the
26 Emma's Rose embroidery, which constitutes copyrightable subject matter under the laws of the
27 United States.
28

1 18. Plaintiff has complied fully with 17 U.S.C. § 101 et seq., the statutory deposit and
2 registration requirements thereof, and all of the laws governing federal copyrights, to secure the
3 exclusive rights and privileges in and to the copyright for the Emma's Rose embroidery, and has filed
4 the requisite application and obtained from the Register of Copyrights Certificate of Copyright
5 Registration Number VA 1-272-148 covering the Emma's Rose Embroidery.

6 19. Since the date the Emma's Rose copyright was published, Plaintiff has owned the
7 Emma's Rose copyright and owns all copyright interests in the Emma's Rose embroidery.

8 20. Plaintiff is informed and believes, and on that basis alleges, that since [2006], Zoey
9 has willfully infringed and continues to willfully infringe Plaintiff's copyrights in its Emma's Rose
10 embroidery. In particular, Zoey has copied the original Emma's Rose design and, without Plaintiff's
11 consent, has distributed girls' dresses that include an embroidery design substantially similar to
12 Emma's Rose.

13 21. Exhibit D attached hereto reveals the substantial similarity between Plaintiff's
14 copyrighted Emma's Rose embroidery and Zoey's infringing embroidery.

15 22. Zoey's copying of Plaintiff's copyrighted design constitutes copyright infringement in
16 violation of 17 U.S.C. § 501 et seq.

17 23. Unless restrained and enjoined by this Court, Zoey will continue to infringe Plaintiff's
18 Emma's Rose copyright.

19 24. As a direct consequence of Zoey's infringement, Plaintiff has suffered irreparable
20 injury. Plaintiff will continue to suffer irreparable injury unless the Court enjoins Zoey from
21 infringing the Emma's Rose copyright.

22 25. Plaintiff is informed and believes, and on that basis alleges, that Zoey has derived,
23 received and will continue to derive and receive gains, profits and advantages from its infringement,
24 including gains, profits and advantages not presently known to Plaintiff, and Plaintiff has been and
25 will continue to be greatly damaged in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment against Defendant as follows:

1. That Zoey and its officers, agents, servants, employees and attorneys, and all those persons in active concert or participation with them, be forthwith preliminarily and thereafter be permanently enjoined, pursuant to 17 U.S.C. § 502, from:

a. Copying, reproducing, creating derivative works of, distributing, using, marketing, or selling Plaintiff's design in the Emma's Rose embroidery or any substantially similar variation of Plaintiff's design in the Emma's Rose embroidery in any manner; and

b. Otherwise infringing Plaintiff's copyright rights.

2. That Zoey be required to account to Plaintiff for any and all profits derived by Zoey and for all damages sustained by Plaintiff by reason of Zoey's actions complained of herein;

3. That Zoey be held liable and be ordered to pay Plaintiff all damages that Plaintiff has sustained resulting from Zoey's acts complained of herein, subject to proof at trial, and that Plaintiff be awarded the profits of Zoey derived by reason of said acts, or statutory damages, whichever is greater, all as determined by said accounting;

4. That any statutory damages be increased and awarded to Plaintiff pursuant to 17 U.S.C. § 504;

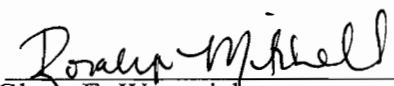
5. That Plaintiff recover its costs, attorneys' fees and expenses of this suit from Zoey pursuant to 17 U.S.C. § 505; and

6. That Plaintiff be awarded such other and further relief as the Court may deem just and proper.

DATED: July 17, 2007

NIXON PEABODY LLP

By:


Glenn E. Westreich
Rosalyn P. Mitchell
Attorneys for Plaintiff
BISCOTTI, INC.

DEMAND FOR JURY TRIAL

Plaintiff BISCOTTI, INC. hereby demands a trial by jury on all issues triable of right by a jury that are raised for determination by this Complaint or that may be raised by any counterclaim to be filed herein.

DATED: July 17, 2007

Respectfully submitted,

NIXON PEABODY LLP

By: Rosalyn P. Mitchell
Glenn E. Westreich
Rosalyn P. Mitchell
Attorneys for Plaintiff
BISCOTTI, INC.

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS/CORPORATE

DISCLOSURE

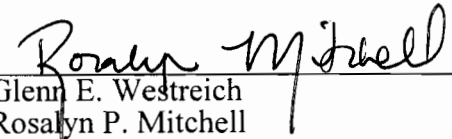
Pursuant to Civil Local Rule 3-16 and Federal Rule of Civil Procedure 7.1, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report and are no such parties to identify.

DATED: July 17, 2007

Respectfully submitted,

NIXON PEABODY LLP

By:


Glenn E. Westreich
Rosalyn P. Mitchell
Attorneys for Plaintiff
BISCOTTI, INC.

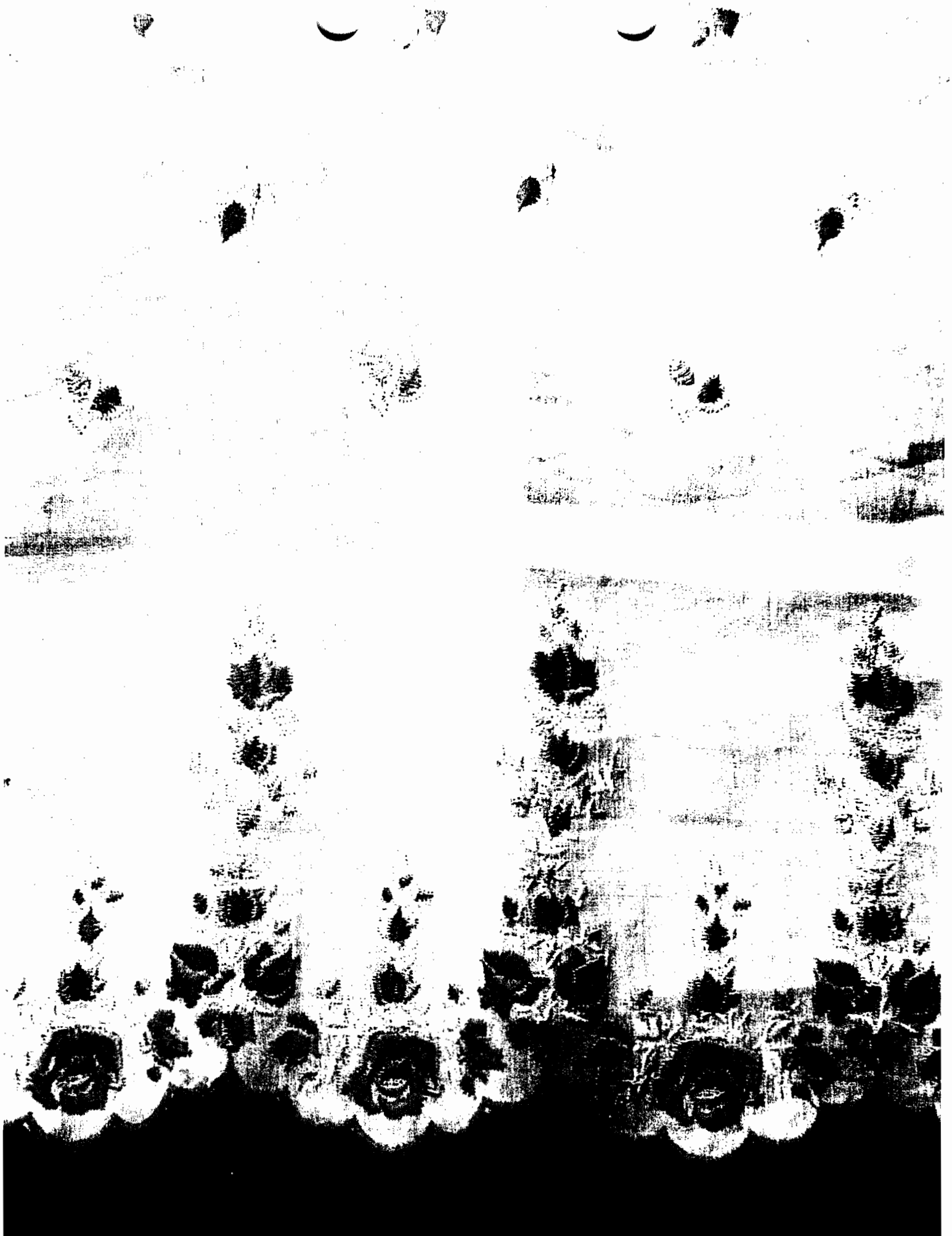


EXHIBIT B

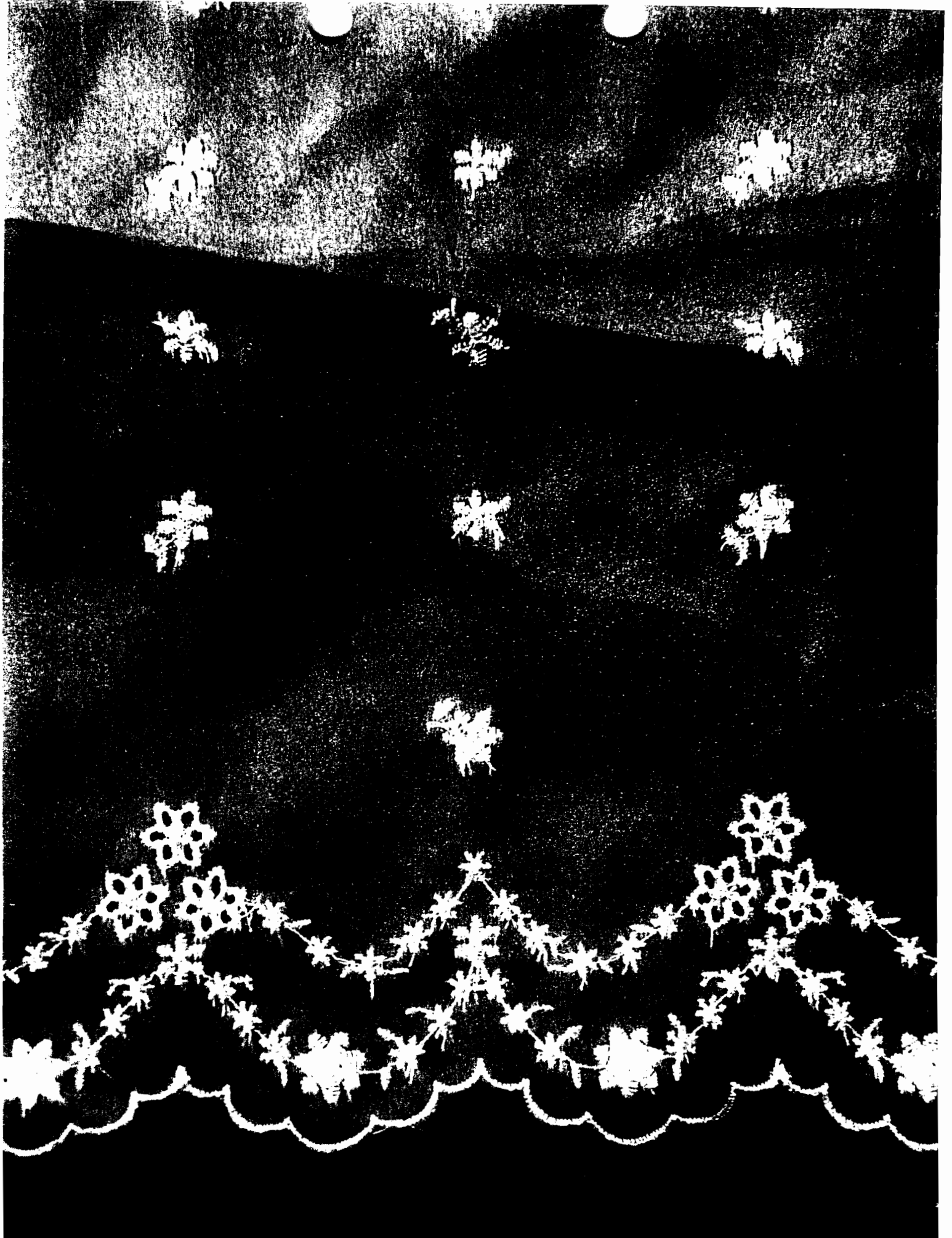


EXHIBIT C

Certificate of Registration

FORM VA
For a Work of the Visual Arts
UNITED STATES COPYRIGHT OFFICE

VA 1-272-148



DATE OF REGISTRATION

AUG 26 2004

Month Day Year



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

ARATE CONTINUATION SHEET.

NATURE OF THIS WORK ▼ See instructions

EMMA ROSE

Fabric Design

Previous or Alternative Titles ▼

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

Biscotti, Biscotti Collezione, Baby Biscotti, Amber Celeste, Jenny Annie Dots, Amanda Rose, Kate Mack, Water Ballet

If published in a periodical or serial give: Volume ▼ Number ▼ Issue Date ▼ On Pages ▼

NAME OF AUTHOR ▼

a Biscotti, Inc.

DATES OF BIRTH AND DEATH

Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?

☒ Yes
☐ No

Author's Nationality or Domicile

OR { Citizen of U.S.A.
Domiciled in

Was This Author's Contribution to the Work

Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No
If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es). See instructions

☐ 3-Dimensional sculpture ☐ Map ☐ Technical drawing
☒ 2-Dimensional artwork ☐ Photograph ☐ Text
☐ Reproduction of work of art ☐ Jewelry design ☐ Architectural work

Name of Author ▼

b

Dates of Birth and Death

Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?

☐ Yes
☐ No

Author's Nationality or Domicile

OR { Citizen of
Domiciled in

Was This Author's Contribution to the Work

Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es). See instructions

☐ 3-Dimensional sculpture ☐ Map ☐ Technical drawing
☐ 2-Dimensional artwork ☐ Photograph ☐ Text
☐ Reproduction of work of art ☐ Jewelry design ☐ Architectural work

Year in Which Creation of This Work Was

Completed 2004

This information must be given in all cases.

Date and Nation of First Publication of This Particular Work

Complete this information ONLY if this work has been published. Month JULY Day 31 Year 2004

Nation

COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼

Biscotti, Inc.
5601 San Leandro Street, Oakland, CA, 94621

Transfer If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

APPLICATION RECEIVED

AUG 26 2004

ONE DEPOSIT RECEIVED

AUG 26 2004

TWO DEPOSITS RECEIVED

FUNDS RECEIVED

DO NOT WRITE HERE OFFICE USE ONLY

MORE ON BACK ►

• Complete all applicable spaces (numbers 5-8) on the reverse side of this page.
 • See detailed instructions.
 • Sign the form at line 8.

DO NOT WRITE HERE

Page 1 of 2 pages

1

2

NOTE

Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

3

4

See instructions before completing this space.

CHECKED E

☐ CORRESPONDENCE

Yes

COPYRIGHT
OFFICE
USE
ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?☐ Yes ☒ No If your answer is "Yes," why is another registration being sought? (Check appropriate box.) ▼a. ☐ This is the first published edition of a work previously registered in unpublished form.b. ☐ This is the first application submitted by this author as copyright claimant.c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: Previous Registration Number ▼

Year of Registration ▼

DERIVATIVE WORK OR COMPILATION Complete both space 6a and 6b for a derivative work; complete only 6b for a compilation.a. **Preexisting Material** Identify any preexisting work or works that this work is based on or incorporates. ▼a
See instructions
before completing
this space.b. **Material Added to This Work** Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼**DEPOSIT ACCOUNT** If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.

Name ▼

Account Number ▼

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP ▼

Nannette Love / Robert Mack

c/o Biscotti, Inc., 5601 San Leandro Street, Oakland, 94621

Area code and daytime telephone number (510) 434-9122

Fax number (510) 532-3269

Email

CERTIFICATION* I, the undersigned, hereby certify that I am the

check only one ▶

☐ author☐ other copyright claimant☐ owner of exclusive right(s)☒ authorized agent of Biscotti, Inc.

Name of author or other copyright claimant, or owner of exclusive right(s) ▲

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

Bernadette Reiss

Date 8/16 2004

Handwritten signature (X) ▼

X

Certificate
will be
mailed in
window
envelope
to this
address:

Name ▼

Biscotti, Inc. Attn.: Nannette Love-

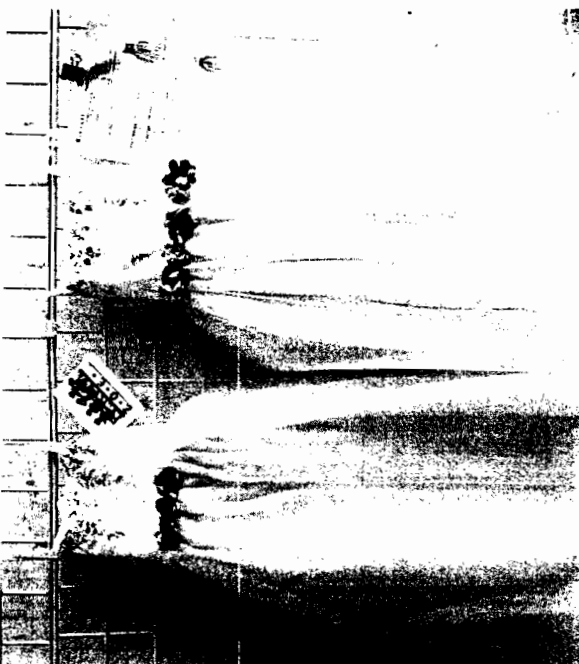
Number/Street/Apt ▼

5601 San Leandro Street

City/State/ZIP ▼

Oakland, CA 94621

• Complete all necessary spaces
• Sign your application in space 61. Application form
2. Nonrefundable filing fee in check or money
order payable to Registrar of Copyrights
3. Deposit materialLibrary of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-8000Fees are subject to
change. For current
fees, visit the
Copyright Office
website at
www.copyright.gov,
write the Copyright
Office, or call
(202) 707-9000.



Biscotti Dress Bodice
Tag ID: size 7 style#C27678B

A

B

C

A

B

C

